WORKSHOP ON CONSULTATIONS ON TERRITORY AND NATURAL RESOURCES – MODERNIZATION OF THE NATIONAL ENERGY BOARD

Workshop
March 27 and 28, 2017
Presentation outline

- **PART 1:** Overview and follow-up for ongoing and upcoming consultations

- **PART 2:** Focus on the review of the environmental and regulatory processes
  - *The Fisheries Act* and the *Navigation Protection Act*
  - Environmental Assessment Process according to the *CEAA 2012*
  - Openness following the review process

- **PART 3:** Assessment of the consultation procedures and consideration for First Nations rights and interests - plenary discussion
Overview and follow-up of the consultations

- Overview of the consultations, Quebec and federal levels, ongoing and upcoming in 2016-2017 and 2017-2018
- Support of the centre of expertise in consultation with the FNQLSDI
- Consultation, engagement, mobilization processes
- Thirty major processes in less than a year
- Non-exhaustive list
- To this are added:
  - Local consultations
  - Processes without consultations
  - Tables, committees, etc.
Bill 102 – Modernization of the Environment Quality Act (EQA) (MDDELCC)

- Targeted consultations: April 2015
- Tabling of the Bill: June 7, 2016
- Parliamentary Committee: November 22-29, 2016
- Adoption in principle: December 1, 2016
- Clause by clause consideration: started on December 6, 2016
- Passage of Bill 102: March 23, 2017

✓ Letter of comments sent by the AFNQL on November 29th
✓ Press release from AFNQL on January 18, 2017
✓ No mention of FN in this bill
✓ Main changes: modernizing the authorization system, setting the authority of the Minister, changing the role of the BAPE, access to information
Provincial consultations

- Bill for the preservation and sustainable use of wetlands and aquatic environments (MDDELCC)
  - Bill 32 sanctioned in February 2015 to postpone the adoption of an act on WAE. Adopted « interim » act: *Act respecting compensation measures for the carrying out of projects affecting wetlands or bodies of water* (until 2017)
  - Consultation meeting on **October 14, 2016** on future directions of the Bill – Comments could have been submitted until **Oct. 28, 2016**
  - Assent of the Bill planned for **April 24, 2017**

- Lack of integration with Quebec’s water strategy
- Lack of information on the protection of lakes and watercourses
- Highlighting of rare and exceptional environments
- Consultation document: more questions than answers
Bill 122 – An act mainly to recognize that municipalities are local governments and to increase their autonomy and powers (MAMOT)

- Tabling of the bill: December 6, 2016
- Special consultations: February 9 to 23, 2017
- Principle not yet adopted
- Article-by-article analysis will follow

✔ Amendments to municipal acts to increase autonomy of municipalities
✔ New powers for local and regional development
✔ Management of the Quebec-municipal committee, etc.
Provincial consultations

- **Policy on mining sector consultations of Aboriginal communities (MERN)**
  - Consultation in **2015** on a first version
  - Upcoming consultation on a new version (**April-May 2017**)
  - Consultation meeting in May with the MERN

- **Consultation policy on sustainable forest management directions (MFFP)**
  - Upcoming consultation (end March – April 2017)
  - Consultation on the Aboriginal community consultation manuals on the 2018-2023 PAFI should follow in 2017
Provincial consultations

  - Guidelines presented to the “Table Nationale Faune”
  - Consultation of FNs: winter-spring 2017
Federal consultations

- **Species at Risk Policies**
  - Seven policies issued by the Government on the Species at Risk Public Registry – email sent on September 19th
  - Comments to be submitted before November 18, 2016 – **postponed to March 31, 2017**

  ✔ Involvement of FNs in the listing and conservation of species at risk
  ✔ Issue of compensatory measures - destruction of critical habitat
  ✔ Transparency of ministerial decisions

- **Improving Marine Safety – Area Response Planning Initiative for Oil spills** (Transport Canada, DFO, Coast Guard)
Federal consultations

- **Coral & sponge conservation strategy**
  - Consultation of communities with fishing interests at the end of January – end of February 2017
  - Affected fishers will be consulted again **this fall** before conservation measures are implemented in **December**

- ✓ No expanded consultation
- ✓ Possible impacts on the fishing activities of FN
- ✓ Possible support for certain conservation positions of FN
Federal consultations

- **Energy East** (NEB + NR Canada)
  - Suspension of hearings – recusal of 3 members: **August 2016**
  - Trend: Approval of Kinder Morgan Transmountain + Enbridge Line 3
  - Rejection of Northern Gateway: **December 2016**
  - Appointment of 3 new members to the hearing panel - Don Ferguson (NB), Marc Paquin (QC), Carole Malo (ON): **January 2017**
  - Decision on the consequences of the recusal of the hearing panel and how to resume this hearing: **January 27, 2017**
  - Resumption of hearings?
  - Alternative consultation process (NRCanada)
    - To understand Indigenous interests and adapt future consultations
    - To assist the Crown in making its decision on the Energy East project
    - February 24, 2017: Providing comments/suggestions on this offer
    - Does this allow the federal government to meet its consultation obligations?
Federal consultations

- Review of environmental and regulatory processes
  - Implementation of the 2012 federal budget through the use of two tools:
    - Jobs, Growth and Long-term Prosperity Act \((C-38)\)
    - The Jobs and Growth Act 2012 \((C-45)\)
  - More than 90 federal laws modified without the consultation or the possibility of the participation of Aboriginal communities
  - June 20, 2016: comprehensive Review of environmental and regulatory processes
  - 2 key points: commitments to Aboriginal peoples + international commitments to fighting climate change

“The Government believes that rebuilding trust begins with a coordinated, open and transparent process based on scientific evidence, working in partnership with Indigenous Peoples, and provinces and territories, and taking into account input from a range of stakeholders, including the public, industry, and environmental groups.”

Federal consultations

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<tr>
<th>Reviewed by</th>
<th>Canadian Environmental Assessment Act</th>
<th>NEB modernization</th>
<th>Fisheries Act</th>
<th>Navigation Protection Act</th>
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<tr>
<th>Progress</th>
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<th>Committee’s report published</th>
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- Engagement and mobilization activities organized for the 4 components
- Support of the FNQLSDI: provincial events, working groups, briefs, follow-up, information notes
  - Objective: improve the sharing of information and facilitate FN participation in this Review
Review of the modifications made to the *Fisheries Act* and the *Navigation Protection Act*
Presentation outline

- **Navigation Protection Act**
  - Objectives and modifications (reminder)
  - Review process
  - Report of the TRAN
  - To be continued...

- **Fisheries Act**
  - Objectives and modifications (reminder)
  - Review process
  - Report of the FOPO
  - To be continued...
Navigation Protection Act
Objectives and modifications (reminder)

- **Objectives**
  - The **restoration** of eliminated protective measures;
  - The **integration** of modern safeguards.

- **Examples of changes made by C-38 and C-45**
  - Navigable **Waters** Protection Act → **Navigation** Protection Act;
  - Transfers to the National Energy Board (NEB) federal jurisdiction over navigation in respect of certain **pipelines** and **power lines** that cross navigable waters;
  - Application of the Act limited to **162 navigable waterways** in Canada, listed in the Appendix of the legislation.
The Standing Committee on Transport, Infrastructure and Communities (TRAN) commits itself to dedicating up to 8 meetings “to conduct a study and report on the changes to the Navigation Protection Act that came into force in 2014”

- 7 meetings dedicated to reviewing the Act
- Testimonials + question periods

* Comments could still be sent to Transport Canada until January 30, 2017
Participation of the FNQLSDI

- **Supporting** role (*no direct response to mobilization activities*)
- Preliminary **technical** analysis
- Training and facilitation of a **working group**
- Drafting and sharing of a “**standard**” **brief** integrating the comments of the working group’s participants

- Importance and interest in terms of navigation for FN (identity, culture, economy, subsistence activities, etc.)
- FN rights to water and navigation (need for explicit recognition in the Act, protection of Aboriginal rights as a guiding principle, etc.)
- Considerations with respect to the current appendix (return to the "canoe test" OR facilitation of the waterway addition process)
- Measures for FN consultation and accommodation
Navigation protection Act
Report of the TRAN

- Presented to the House on March 23, 2017
- 18 witnesses & 256 written briefs
  (70 submitted by Indigenous groups, including 11 from FNs in Quebec)
  - TRAN process (timeline, Standing Committee, etc.)
  - Vision of the Schedule (keep vs. remove) and territorial specificities
  - Links to other components of the Review (CEAA, NEB, fisheries)
- 11 recommendations, including:
  - Maintain the Schedule but improve the process of adding waterways
  - Include Transport Canada in the decision-making process for EA of pipelines and electrical transmission lines that cross navigable waters
  - “That the government examine ways of preserving, protecting and respecting navigation on waterways on traditional aboriginal lands and recognize the special relationship that Indigenous communities have with waterways and impose a requirement that project proponents adequately inform stakeholders of a work before it commences so as to provide opportunities for appropriate consultations to be undertaken”
Submission of the TRAN’s report

- Request for a “comprehensive” response from the Minister
- Art. 109 of the *Standing Orders of the House of Commons*

Minister’s response (max. 120 days*)

New version of the Act

- Proposals for amendments
- Continuation of the parliamentary process
- Official consultations?

* “The Standing Orders do not provide for any sanction should the government fail to comply with the request for a response.”

([http://www.parl.gc.ca/About/House/Compendium/web-content/c_d_governmentresponsecommitteereport-e.htm](http://www.parl.gc.ca/About/House/Compendium/web-content/c_d_governmentresponsecommitteereport-e.htm))
Fisheries Act
Objectives and modifications (reminder)

- Objectives
  - The restoration of eliminated protective measures;
  - The integration of modern safeguards.

- Examples of changes made by C-38 and C-45:
  - Prohibition against killing fish by any means other than fishing.*
  - Prohibition against carrying on any work, undertaking or activity that results in the harmful alteration or disruption, or the destruction, of fish habitat.*
  - Prohibition against carrying on any work, undertaking or activity that results in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery.*

* Except as provided by law
**Fisheries Act**

**Review Process**

- **Beginning of the process**
- **FOPO meetings**
  - 10 meetings dedicated to reviewing the Act
  - Testimonials + question periods
- **Brief submission deadline**
  - From **October 17th to November 25th**, the FOC conducted an online public consultation ([http://www.letstalkfishhabitat.ca/](http://www.letstalkfishhabitat.ca/)).

This process is considered complementary but **separate** from that of the FOPO.
**Fisheries Act**

**Review process**

**Aboriginal:** “in relation to a fishery, means that fish is harvested by an Aboriginal organization or any of its members for the purpose of using the fish as food, for social or ceremonial purposes or for purposes set out in a land claims agreement entered into with the Aboriginal organization.”

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**Paragraph 35(1):** No person shall carry on any work, undertaking or activity that results in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery.

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**WORKING GROUP**

- The definition of “Aboriginal fishery” seems problematic.
  - Should include the aspect of Aboriginal fishing rights.
  - Could be tweaked using elements established by court decisions (e.g. Marshall case).
  - Could be enhanced by incorporating the subsistence fishing aspect.
SUMMARY OF THE PRELIMINARY ISSUES (WORKING GROUP)

- Importance of incorporating the concept of “ecosystem approach” (all species and the habitat on which they depend).

- Importance of the connections between the four components of “the Review of the environmental and regulatory processes” (holistic approach).

- Concerns regarding the consideration of Aboriginal fishing rights:
  - Problematic definitions (“Aboriginal fishery”, “public interest”, “ecologically significant areas”).
  - Scope of the powers of the Minister and the Governor in Council.
  - Project review process giving too much leeway to the proponent.
Fisheries Act
Report of the FOPO

Presented to the House on February 24, 2017

Based on:

- 50 testimonials before the Commission
- 188 briefs received (including 10 from FNs in Quebec)
- DFO’s report on its online consultation (late reception)

Format: Participant’s comments – FOPO’s recommendations

Example of a comment presented in the report:

“The Listuguj Mi’gmaq Government, Quebec, argued that Indigenous fishing rights include far more than fishing for food, social, and ceremonial purposes. These rights also comprise commercial fishing with or without a licence as confirmed by the Marshall decision of the Supreme Court of Canada.”
Fisheries Act
Report of the FOPO

32 recommendations - 4 “major topics”

✓ Protection of fish and fish habitat
✓ Authorizations
✓ Fisheries and Oceans Canada
✓ Powers of the Minister
Multiple recommendations incorporating general comments from several FNs and other stakeholders (scientists, lawyers, environmental organizations, etc.)

- Reinstatement of the “HADD (harmful alteration, disruption or destruction of fish habitat) prohibition”
- Concepts of ecosystem approach and cumulative effects
- Reduction of recourse to self-assessment by developers
- Revision of the beginning of the environmental assessment
- Transparency of the minister in the exercise of discretionary powers
- Reinstatement of “no net loss” and “net gain” policies
Fisheries Act
Report of the FOPO

- **Few** recommendations that clearly integrate First Nations:
  - Establishment of an advisory committee that should include “commercial, recreational and Indigenous fisheries representatives”
  - Maintenance of DFO funding for fisheries conservation and enhancement projects “in co-operation with the Indigenous communities, the agricultural communities, and fisheries conservation organizations”

**West Coast Environmental Law’s response:**

“The report lacks depth in its treatment of Indigenous fisheries and fisheries management, which is disappointing given all the submissions and testimony that Nations provided.”

- Back to schools: Canada’s fish happy with new report, look forward to amended law, March 13, 2017

- The importance of continuing to **follow and be involved** in the modernization process for the Act
Submission of the FOPO’s report

- Request for a “comprehensive” response from the Minister
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- Proposals for amendments
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(http://www.parl.gc.ca/About/House/Compendium/web-content/c_d_governmentresponsecommitteeereport-e.htm)
Review of the environmental assessment processes associated with the CEAA 2012
Introduction

- In January 2016, the Government of Canada announced its intention to implement a comprehensive strategy to review Canada's environmental assessment processes
  
  - The process for reviewing Canada's environmental assessment and regulatory processes would be conducted by an Expert Panel.

- On June 20, 2016, the review work began
  
  - Pan-Canadian consultation from June 20 to July 20, 2016 on the draft terms of reference for the Expert Panel
  
  - The definitive terms of reference for the Expert Panel were drafted
  
  - The Expert Panel was established on August 15, 2016
Review process
Mandate of the Expert Panel

Conduct a review of the environmental assessment processes associated with the CEAA 2012

- To do this, the Panel had to mobilize:
  - Canadians,
  - Provinces and Territories,
  - Aboriginal peoples,
  - Other key stakeholders.

- Following the mobilization activities, the Expert Panel must now:
  1) Colligate all of the collected information
  2) Draft a brief intended for the Minister of Environment (March 31, 2017)

The objective of the report is to make recommendations to strengthen and improve the federal environmental assessment processes.

The Expert Panel traveled the country from September 19 to December 15, 2016, stopping in 21 cities along the way.
Work of the FNQLSDI

In a complementary fashion with the Expert Panel’s work, the FNQLSDI carried out various actions to support and encourage the participation of the First Nations in Quebec and Labrador in the review conducted by the Expert Panel.

- **Inform and support the communities**
  - Drafting of briefing notes

- **Mobilization, networking and implementation of consultation mechanisms**
  - Creation of a provincial event working group

- **Document preparation**
  - Standard brief

- **Analysis and follow-up**
  - Summary of the comments and recommendations
  - Review of the Expert Panel’s report
  - Analysis
Participation of the First Nations

The participation of First Nations across Canada in the review process conducted by the Expert Panel was significant.

- Nearly **100 briefs** were submitted, not to mention participation through other means of exchange that were set up by the Expert Panel.

- In Quebec and Labrador, the First Nations submitted a total of **twelve briefs**
  - *Innus de Mashteuiatsh, Essipit et Nutashkuan (joint submission)*
  - *Grand Council of the Crees (Eeyou Istchee)*
  - *Nation Naskapi (Kawawachikamach)*
  - *Nation des Innus de Matimekush-Lac John*
  - *Wolf Lake First Nation*
  - *Kebaowek First Nation*
  - *Timiskaming First Nation*
  - *Innus de Ekuanitshit*
  - *Grand Conseil de la Nation Waban-Aki*
  - *Mohawk Council of Kahnawake*
  - *Kitigan Zibi Anishnabeg*
  - *Nation huronne-wendat (Wendake)*
Main issues raised by the First Nations in Quebec and Labrador:

- Include the concept of ecosystem in the environmental impact assessment
- Initiate dialogue with First Nations upstream of the EA process
- Recurring and adequate funding for First Nations
- Realistic deadlines for submitting comments or consulting with community members
- Importance of developing a separate First Nations consultation policy, supported by articles featured in the Act
- Integrate First Nations in the decision-making process, obtain FPIC
- First Nations impact assessments must be conducted jointly with First Nations and featured in a separate chapter of the impact assessment
- Importance of documenting the cumulative or residual impacts of a project
- Importance of strategic environmental assessments upstream of development

A number of other issues were raised by the First Nations in Quebec and Labrador. The above-mentioned issues are those that were raised most often in the submitted briefs.
Next steps

- The Expert Panel submits its recommendations to the Minister of Environment

- The report is made public

  Consultation period of 30 days
  
  At the request of the Minister, the Expert Panel provides details on the findings and recommendations made

- Initiation of the review work for the CEAA

  Taking into account and integrating the recommendations made

- It is up to the Minister of Environment to take into account the recommendations and conclusions proposed by the Expert Panel and initiate the review work for the CEAA.
Recently, the Chair of the Expert Panel, Ms. Johanne Géléinas, sent a letter to:

- **Michael Binder**
  President of the Canadian Nuclear Safety Commission (CNSC)

- **Alan Kerr**
  Vice-President of the Canadian Environmental Assessment Agency (CEAA)

- **C. Peter Watson**
  CEO of the National Energy Board (NEB)

The objective of these correspondences was to find out the **costs** associated with conducting environmental assessments for each of the various bodies.

*What can one think of these correspondences or perhaps even deduce from them?*
Recommendations made by the Expert Panel

For the time being, we cannot say anything in a definite fashion, however...

It is noted that many stakeholders have made the following recommendation:

*The CEAA should be the sole body responsible for conducting the environmental assessment process for ALL development projects under federal jurisdiction.*

All official documents received by the Expert Panel (letters, emails or briefs) can be consulted on the website created by the Expert Panel:

http://eareview-examenee.ca/what-weve-heard/
The response of the National Energy Board to the correspondence of the Expert Panel responsible for reviewing the environmental and regulatory processes is as follows:

– First, the NEB noted that it was aware of the numerous comments and recommendations to the effect that: 
  “... the environmental assessment process should be removed from the NEB’s project review process” (free translation)

– It then explains how the NEB is in the best position to conduct the environmental assessments for its projects

The NEB's response primarily focuses on the merits of maintaining the NEB's responsibility for conducting environmental assessments.
Subsequently, the NEB details the associated costs and the staff involved in conducting the EAs.

The NEB's conclusions in the correspondence are as follows:

- The NEB considers that it is the best authority for conducting EAs since this allows for establishing a comprehensive picture of activities throughout the life spans of the projects.
- Environmental assessments are a fundamental element of the NEB's core responsibilities which include energy project decision-making, environmental safety and monitoring, energy information and engagement.

No response was provided regarding the costs of conducting an environmental assessment by the NEB.
Links to the modernization of the NEB

- With respect to the NEB’s responsibility to conduct environmental assessments for its projects, what are the recommendations of the Expert Panel tasked with modernizing the NEB?

- What influences will the recommendations of the two Expert Panels have on the NEB’s modernization?

- Will the NEB be willing to make changes to its operations?
Integration of the reviews

- **Necessary coordination between the 4 components**
  - Administrative coordination by the MPMO + the [Major Projects Deputy Ministers’ Committee](#).... ?? Role of Minister Bennett?
  - Several subjects linking the 4 components:
    - Responsibility for environmental assessments
    - Engagement and consultation of Indigenous peoples during the reviews and participation in the monitoring (changing context)
    - Transparency
    - Taking into account of scientific data, facts and evidence
    - Co-operation with other jurisdictions
    - Conformity, monitoring and enforcement
    - Regional studies
    - Public participation
    - Timescales
    - Decision-making
    - Overlap when taking effects into account (e.g. on fish, navigation)
Immediately review Canada’s environmental assessment processes to regain public trust and help get resources to market and introduce new, fair processes that will:
- Restore robust oversight and thorough environmental assessments of areas under federal jurisdiction, while also working with provinces and territories to avoid duplication
- Ensure that decisions are based on science, facts, and evidence, and serve the public’s interest;
- Provide ways for Canadians to express their views and opportunities for experts to meaningfully participate; and,
- Require project advocates to choose the best technologies available to reduce environmental impacts.

Modernize the NEB to ensure that its composition reflects regional views and has sufficient expertise in fields such as environmental science, community development, and Indigenous traditional knowledge.

Review the changes made in 2012 to the Fisheries Act and the Navigable Waters Protection Act, restore lost protections, and incorporate modern safeguards.

Collaborate in EA review to ensure that environmental assessment legislation is amended to enhance the consultation, engagement and participatory capacity of Indigenous groups in reviewing and monitoring major resource development projects.

Support EA review to ensure that environmental assessment decisions are based on science, facts, and evidence.

Ministerial Mandates
Review of Environmental and Regulatory Processes

Minister McKenna
- Environment Assessment Expert Panel
- NEB Modernization Panel
- Standing Committee on Fisheries and Oceans
- Standing Committee on Transport, Infrastructure and Communities

Minister Carr

Minister LeBlanc

Minister Garneau

Minister Bennett

Minister Duncan

Final Reporting Winter – Spring 2017
Integration of the reviews

- Coordination among governments

**FEDERAL RESPONSIBILITY**
- Management of:
  - Resources on federal Crown lands
  - International and interprovincial pipelines
  - International and designated interprovincial powerlines
  - Nuclear facilities and activities and uranium mines
  - Fish, fish habitat and aquatic species at risk
  - Explosives manufacturing and storage
  - Navigation and shipping
  - Indigenous health

**PROVINCIAL RESPONSIBILITY**
- Management of:
  - Resources on provincial Crown lands
  - Oil and gas, mining operations
  - Water quality/use
  - Air quality
  - Wildlife management
  - Worker health and safety
  - Explosives storage and use

**SHARED RESPONSIBILITY**
- Environmental assessments
- Duty to consult Indigenous peoples when decisions impact on existing or potential rights
- Species at Risk
- Management of offshore oil and gas under Accords
- Environmental monitoring
- Health
Integration of the reviews

- What’s next?
  - NEB: continuation of the process
  - Follow-up on the processes, paying special attention to their interrelations
  - Uncertainty about decisions of the various ministers
  - Choices regarding energy allocation (reports analysis, next steps?)
  - Participation to the consultation on possible changes to laws, regulations and policies
    - *Fisheries Act*
    - *Navigation Protection Act*
    - CEAA 2012
    - *National Energy Board Act*
  - Coordination between First Nations
Merci
Thank you
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Questions?